

# **REQUEST FOR FINAL APPROVAL OF THE Real Estate Management Administrative Rules**

**December 15, 2008**

**Proposal:** The department is requesting final approval for the Real Estate Management Rules. These rules have been developed to implement the department's Real Estate Management Plan (Plan) for Montana's state trust land in compliance with MAPA (Montana Administrative Procedures Act) requirements for programmatic policies. The Plan was approved by the Land Board and adopted by the department on July 18, 2005.

**Background:** The department presented draft rules to the Land Board on August 18, 2008 and received Board approval to continue the rule-making process.

The department published a proposal notice in the Montana Administrative Register (MAR) on September 11, 2008. The department provided a 28 day comment period from September 11 to October 9, 2008, and held a public hearing on October 2 in Helena. The department has responded to all comments received (see attached adoption notice).

**Summary of Rules and Proposed Changes:** The department is proposing eighteen rules. The significant changes proposed by the department are noted in the following summary.

**Rule I** provides definitions of significant terms used in these rules.

1. The department added a definition for "developed," "easement," and "industrial." "Project" was changed to "real estate project."

**Rule II** states the parties accountable to these rules.

**Rule III** establishes what department actions to which these rules will and will not apply.

1. The department added exclusions for sales and exchanges completed before July 18, 2005, and real estate activities within navigable waterways.
2. The department deleted paragraph (4) as unnecessary.

**Rule IV** sets development standards for real estate projects on state trust lands. These standards are consistent with the provisions of Plan.

1. The department moved subparagraph (3)(i) from paragraph VI(4) and added Wildland Urban Interface (WUI) and fire hazard area. Impacts resulting from real estate projects in those areas listed in (3)(i) will be avoided or mitigated.
2. The department added paragraph (5). This provision from the Plan limits development in rural areas to certain uses, but allows other uses when one or more of the criteria are met.

**Rule V** clarifies when a real estate project must go through the project evaluation process provided in Rule VI through Rule X.

**Rule VI** establishes the project evaluation process and the criteria that must be considered in an evaluation.

1. The department added subparagraph (1)(m) to include WUI and fire hazard areas in the list of factors for evaluation of proposed real estate project.
2. As previously stated, the department moved paragraph (4) of this rule to Rule IV(3)(i).

**Rule VII** establishes that department personnel will develop a site selection report that meets specific criteria when proposing a real estate project.

**Rule VIII** describes the project identification team that will evaluate project proposals, prioritize projects, and allocate funding for development costs, according to established criteria.

**Rule IX** establishes that a project list will be provided to the Land Board and interested parties following the approval of new projects by the project identification team.

1. The department will maintain a list of interested parties that the department will notify directly when new projects are selected by the project identification team.

**Rule X** describes procedures for notification of conservation entities in advance of initiating a real estate project on state trust land. Conservation entities may respond with a letter of interest to secure a conservation use, and are allowed specific periods of time to apply for conservation lease, license or easement, and complete the transaction. The department will assess the merits of a conservation proposal before determining a course of action.

**Rule XI** establishes statewide acreage threshold and a rural acreage threshold for developed land. A key component of the ROD and the rules is the concept of “programmatic reevaluation.” Once either the statewide or rural threshold is met, the department will conduct a reevaluation of the Real Estate Management Plan. This rule further describes what developments will trigger the thresholds.

**Rule XII** provides exemptions from the statewide and rural thresholds for certain types of real estate projects.

1. The department added commercial and industrial development to the exemption for development that is clustered on 25 percent of a tract when the remainder is conserved as open space.
2. The department revised the exemption for sales or exchanges of isolated tracts – the exemption is not available in Beaverhead, Broadwater, Carbon, Cascade, Flathead, Gallatin, Lewis and Clark, Lake, Madison, Missoula, Park, Powell, Ravalli, Stillwater, Sweet Grass, Teton, and Yellowstone counties.
3. The department added an exemption for tracts sold or exchanged, and developed after five years from the closing date. This exemption is consistent with the Plan.
4. The department added two exemptions from the rural threshold under subparagraph (2):
  - (a) Real estate projects consistent with County zoning; and
  - (b) Real estate projects that:
    - (i) provide infill;
    - (ii) are contiguous to existing development;
    - (iii) are or can be located within a sewer or water utility service area;

- (iv) add value to existing uses;
- (v) demonstrate economic viability; and
- (vi) conform to the development standards in New Rule IV.

**Rule XIII** establishes that the department will account for threshold acreages and other information and regularly provide the information to the Land Board.

**Rule XIV** establishes that the department will review the ongoing implementation of the Plan, and issue a report of its review findings regularly to the Land Board. The rule further establishes the criteria that the Board or department may use when considering a programmatic reevaluation of the Plan based upon the findings.

**Rule XV** clarifies the requirements of 77-1-905(2), MCA, regarding the setting of commercial lease rates on trust lands.

**Rule XVI.** The Land Board has the authority as provided in 77-2-309 and 77-1-310, MCA, to determine which tracts will be surveyed and platted prior to sale. This rule provides the department the authority, subject to Board review, to determine which tracts proposed for sale may be surveyed and platted in advance of taking the sale proposal to the Land Board for approval.

1. The department deleted subparagraph (1)(a) as unnecessary.
2. The department added paragraph (2), wherein the Land Board delegates to the department, consistent with the board's fiduciary duties and subject to the Board's review, its authority to agree to exactions, conditions, restrictions or fees imposed as a condition of zoning, annexation, subdivision or building permit approval.

**Rule XVII** recognizes that an appraisal conducted in advance of issuing a new lease or easement has a limited life span, and the value it provides can, after a time, no longer ensure a fair return. This rule establishes that appraisals used to value easements and leases will be renewed or reviewed if older than one year, or two years, respectively.

1. The department generally revised this rule to clarify department intent.
2. The department added "limited valuation" as a means for determining land value.

**Rule XVIII** implements the MEPA categorical exclusions evaluated in the PEIS adopted July 18, 2005. These activities have been determined through the PEIS to not have effects on the human or natural environment.

1. The department generally revised this rule to clarify department intent.
2. The department added four additional categorical exclusions [(l) through (o)] under paragraph (1):
  - (l) department request to amend a local growth policy or zoning regulation;
  - (m) department request to amend or develop a neighborhood plan or extension of services plan;
  - (n) annexation; and
  - (o) land acquisition.

BEFORE THE BOARD OF LAND COMMISSIONERS AND  
THE DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION OF THE STATE OF MONTANA

In the matter of the adoption of New Rules I (36.25.901) through XVIII (36.25.918) pertaining to the selection, implementation, and reporting of real estate projects on state trust lands ) NOTICE OF ADOPTION

To: All Concerned Persons

1. On September 11, 2008, the Department of Natural Resources and Conservation published MAR Notice No. 36-22-126 regarding a notice of public hearing on the proposed adoption of the above-stated rules at page 1955 of the 2008 Montana Administrative Register, Issue No. 17.
2. The department has adopted New Rule XV (36.25.915) as proposed.
3. The department has adopted New Rule I (36.25.901) through XVI (36.25.914) and XVI (36.25.916) through XVIII (36.25.918) as proposed but with the following changes from the original proposal, matter to be stricken interlined, new matter underlined:

**NEW RULE I (36.25.901) DEFINITIONS** As used in this subchapter, the following definitions apply, except where the context clearly indicates otherwise:

- (1) "Board" means the state Board of Land Commissioners.
- (2) "Bureau" means the Real Estate Management Bureau of the Trust Lands Management Division of the Department of Natural Resources and Conservation.
- (3) "Cluster development" means a subdivision of a tract with building lots concentrated on a portion of the tract and the remainder conserved for open space.
- (4) "Commercial" means the operation by any for-profit entity of any public parking lot, restaurant, bar, hotel, motel, office space, retail store or sales outlet, storage space, gas station, convenience store, shopping center, ~~industrial enterprise~~, warehouse, hospitality enterprise, or concentrated recreational use, multifamily residential use, or other similar uses.
- (5) "Conservation" means a primary land use for open space, preservation of habitat, natural areas, parks, or related public purposes, secured through dedication, lease, license, easement, deed restriction, or other legal instrument consistent with 77-1-203, MCA, for multiple use management.
- (6) "Conservation entity" means a public entity or private organization qualified per Title 76, chapter 6, MCA, to acquire or designate interests and rights in real property to provide or preserve open space.
- (7) "Department" means the Department of Natural Resources and Conservation.
- (8) "Developed" means when a building permit, septic permit, or a permit to connect to a public sewer system, whichever comes first, has been issued for 25

percent or more of the commercial, industrial, or residential lots of a subdivided tract.  
Developed also means a permit has been issued for the construction of a private sewer system.

~~(8)~~ (9) "Division" means the Trust Land Management Division of the department.

(10) "Easement" means land use authorization as defined in 77-2-101, MCA

~~(9)~~ (11) "Entitlement" means an approval or permit obtained from a local government that provides a right to annex, zone, or subdivide a tract of land.

~~(40)~~ (12) "Environmental review" means a written document as defined in 75-1-220(4), MCA.

~~(44)~~ (13) "Growth policy" means a document adopted under Title 76, chapter 1, part 6, MCA.

(14) "Industrial" means a land use that includes manufacturing, wholesaling, warehousing, utilities, heavy transportation, sanitary landfills, sewage treatment facilities, wind farms, feedlots, grain storage bins, irrigation facilities, reclamation projects, electrical substations, intermodal shipping facilities, and other uses.

~~(42)~~ (15) "Isolated tract or land" means any state land not possessing a legal right of access by the public, as provided in 77-2-361(1), MCA.

~~(43)~~ (16) "Joint venture" means a partnership between the department and another entity or entities to undertake a development project, each contributing equity and sharing in the revenues, expenses, and control of the project.

~~(44)~~ (17) "Land classification" means categorizing land according to its principal value, as defined in 77-1-401, MCA.

~~(45)~~ (18) "Lease" means a contract by which the board conveys a limited property interest in state lands for a term of years, for a specified rental, and for a use for which the land is classified.

~~(46)~~ (19) "License" means a contract by which the department conveys a limited property interest in state lands for a specific term and fee, and for a use other than that for which the land is classified.

~~(47)~~ (20) "MEPA" means The Montana Environmental Policy Act, Title 75, chapter 1, parts 1 through 3, MCA.

~~(48)~~ (21) "Other (land)" means a land classification that encompasses residential, commercial, industrial, and conservation uses.

~~(19) "Project" means a proposal to issue a lease or easement for a commercial, residential, or conservation use on a tract where no such lease or easement existed previously, when the one or more of the following are required by a local government in order for the lease or easement to be issued as proposed:~~

~~(a) final subdivision approval;~~

~~(b) annexation; or~~

~~(c) development or amendment of a growth policy or neighborhood plan.~~

~~Project also means the development of entitlements on lands proposed for sale or exchange.~~

~~(20)~~ (22) "Public entity" means a federal agency, state agency, a political subdivision of the state including a county, city, town, municipal corporation, a school district or other special district, a joint agreement entity, a public authority, or any other public body of this or other state.

~~(24)~~ (23) "Public facility" means a building or area operated by a public entity.

~~(22)~~ (24) "Purchase of development rights" means acquiring one or more of the fee-simple interests associated with a parcel of land, such as the commercial or residential development rights.

~~(23)~~ (25) "Rate of return" means the ratio of income received from a project relative to the value of the asset or equity contribution, expressed as a percentage.

~~(24)~~ (26) "Real estate activities" means the following:

- (a) land sales and land banking;
- (b) land exchanges;
- (c) issuance of easements;
- (d) issuance of leases;
- (e) issuance of land use licenses;
- (f) marketing of state trust lands proposed for lease, license, or easement, sale, or exchange;
- (g) requests for proposals;
- (h) planning and design;
- (i) surveying and platting;
- (j) development of entitlements;
- (k) extension of services and infrastructure;
- (l) contracting for services; and
- (m) environmental review; and
- (n) minor repairs, operation or maintenance of existing equipment, improvements, or facilities.

~~(25)~~ (27) "Real Estate Management Plan (plan)" means the PEIS for real estate for the department and the associated Record of Decision (ROD) approved July 18, 2005.

(28) "Real estate project" means a proposal initiated by the bureau to develop state trust land for a commercial, industrial, residential or conservation use, or a public facility where no such use existed previously, when one or more of the following are required by a local government:

- (a) subdivision approval;
- (b) annexation; or
- (c) development or amendment of a growth policy or neighborhood plan.

Real estate project also means the development of entitlements on state trust lands proposed for sale or exchange.

~~(26)~~ (29) "Receiving area" means land that receives additional development rights from land within a sending area. This is a component of a program providing for the transfer of development rights. ~~(27)~~ (30) "Residential" means single family dwellings, duplexes, condominiums, townhouses, cabins, associated ancillary uses, or other types of residential uses recognized by local zoning regulations.

~~(28)~~ (31) "Rural" means a tract that does not meet the criteria for an urban tract.

~~(29)~~ (32) "Sending area" means land that provides additional development rights to other land within a receiving area. This is a component of a program providing for the transfer of development rights.

~~(30)~~ (33) "Subdivision" means a division of land defined by ~~76-3-103(15),~~ Title 76, MCA.

~~(31)~~ (34) "Subdivision review" means a city, town, or county governing body evaluating a subdivision proposal for compliance with the jurisdiction's subdivision regulations.

~~(32)~~ (35) "Threshold" means a predefined ~~target for~~ number of acres of state trust land acres to be developed for commercial, industrial or residential uses that, if met before July 18, 2025, may require a ~~programmatic~~ review of the programmatic plan.

~~(33)~~ (36) "Tract" means a parcel of state trust land that can be identified by legal description, independent of any other parcel of land, using documents on file in the records of the county clerk and recorder's office or in the department's records.

~~(34)~~ (37) "Transfer of development rights" means separating some or all of the development rights from a parcel of land in a "sending area" and transferring those rights to a parcel in a "receiving area," where additional development density is allowed.

~~(35)~~ (38) "Urban" means a tract meeting one or more of the following criteria:  
(a) within the boundaries of an incorporated city or town;  
(b) within 4.5 miles of the boundaries of an incorporated city or town;  
(c) within a public sewer or water district; or  
(d) within one mile of the boundaries of a public sewer or water district. An entire tract of state trust land is urban if any portion of the tract falls within an area described in (35)(a) through (d).

NEW RULE II (36.25.902) ACCOUNTABLE PARTIES (1) The board adopts the rules in this subchapter to provide the Trust Land Management Division of the Montana Department of Natural Resources and Conservation with consistent policy, direction, and guidance when selecting and implementing ~~Real Estate Management Bureau~~ real estate projects on state trust lands.

NEW RULE III (36.25.903) GENERAL APPLICABILITY (1) The Real Estate Management Plan (plan) rules, ARM 36.25.901 through ARM 36.25.918, implement the Programmatic Environmental Impact Statement (PEIS) and the associated Record of Decision (ROD) adopted July 18, 2005.

~~(2) The department shall exempt projects from [NEW RULE I] through [NEW RULE XVII] that, prior to adoption of the ROD, have been subject to public scoping and environmental review processes under MEPA, section 75-1-201, et seq., MCA; or~~

~~(a) received all local government approvals necessary for the completion of the project.~~

(2) The rules apply to real estate projects, sales, and exchanges administered by the bureau on state trust lands, except for the following:

(a) real estate projects that, prior to July 18, 2005, have been subject to public scoping and environmental review processes under MEPA, Section 75-1-201, et seq., MCA;

(b) real estate projects that received all local government approvals necessary for the completion of the real estate project on or before December 15, 2008;

(c) lease lots created prior to July 18, 2005;

- (d) land use licenses;
  - (e) sales and exchanges closed on or before July 18, 2005; and
  - (f) real estate activities within navigable waterways of the state.
- ~~(3) The department shall exempt from [NEW RULE I] through [NEW RULE~~

~~XVII]:~~

- ~~(a) lease lots created prior to adoption of the ROD; and~~
- ~~(b) land use licenses.~~

~~(4) These rules shall not apply where it is determined that their application would directly violate the state's fiduciary duty to a trust beneficiary under Article X, Section 4 or 11, of the Montana Constitution, or Section 11 of the Montana Enabling Act.~~

~~(5) (3) These rules remain in effect until July 18, 2025, whereupon they shall expire.~~

#### NEW RULE IV (36.25.904) GENERAL DEVELOPMENT STANDARDS

(1) The department will actively pursue commercial, industrial, residential, and conservation uses to increase revenue on trust lands, through one or more of the following means:

- (a) targeting those tracts most suitable for development;
- (b) improving entitlements on tracts selected for sale or development, when appropriate; and or

- (c) prioritizing real estate projects with the highest financial return per acre.

(2) The department will give priority to urban real estate projects over rural real estate projects using the following criteria:

- (a) financial rate of return per acre; and
- (b) funding availability; and
- (c) the acres remaining in the development thresholds described in ARM 36.25.911.

~~(3) The department will implement the following standards when selecting, designing, and implementing projects on state trust lands, whenever appropriate and feasible:~~

(3) The department will comply with local and state land use regulations. The department will apply the following development standards in selecting, prioritizing, designing and implementing real estate projects on state trust lands:

- (a) real estate projects should be contiguous to or part of existing or proposed development;

(b) real estate projects in urban locations must connect to existing or planned public infrastructure and be designed to public standards, including alignment to adjoining public and private streets, that are consistent with local land use regulations;

(c) urban real estate projects should achieve urban densities consistent with local land use regulations;

(d) the department will promote mixed use in urban locations through planned-unit development or other means provided by local land-use regulations;

~~(e) the department will comply with local land-use regulations in developing commercial, residential, and conservation uses on state trust lands;~~



~~(f)~~ (e) the department will utilize local land use planning and regulatory processes to involve the general public and beneficiaries in developing state trust lands for commercial, industrial, residential, and conservation uses;

~~(g)~~ (f) the department will coordinate environmental review with local regulatory review;

~~(h)~~ (g) the department may use or promote purchase of development rights, transfer of development rights, cluster development, joint ventures, or other measures as provided by law; and

~~(i)~~ (h) the department will coordinate with local communities, other state and federal agencies, conservation agencies, and other interest groups to provide for notice and review as necessary; and

(i) the department will exclude from consideration, or employ necessary measures to avoid, minimize, or mitigate impacts potentially resulting from commercial, industrial, and residential real estate projects:

(i) on slopes greater than 25 percent;

(ii) in a designated 100-year floodplain or wetland. The department will avoid adverse impacts in the floodplain. Adverse impacts will be determined by the department through an environmental review in compliance with Title 75, chapter 1, MCA;

(iii) that potentially affect federally listed threatened and endangered species or designated critical habitat; and

(iv) in a designated wildland-urban interface or area of high wildfire hazard.

(4) Any commercial, industrial, or residential lease expected to generate annual revenue in excess of \$50,000 may not be issued without the board's prior approval.

(a) The board delegates its authority to the department to issue commercial or industrial leases expected to generate \$50,000 or less annually, but the board reserves the authority to subsequently review the issuance of such leases.

(5) Development in rural areas will include commercial resorts, development for public purposes such as sewer or water, natural resource based development, and conservation opportunities. Other unique development opportunities may be considered when the intended uses:

(a) provide infill opportunities;

(b) are contiguous to existing development;

(c) are or can be located within a sewer or water utility service area;

(d) add value to the existing uses;

(e) demonstrate economic viability and conform to applicable development standards; or

(f) limit development to not more than 25 percent of a tract while the remainder of the tract is designated for conservation through an easement, deed restriction, or dedication at final subdivision approval.

NEW RULE V (36.25.905) PROJECT EVALUATION, REVIEW, AND SELECTION PROCESS (1) ARM 36.25.906 through 36.25.910 describe the evaluation, review, and selection process for real estate projects on state trust lands.

(2) The department will require ARM 36.25.906 through 36.25.910 for real estate projects initiated following [the effective date of these rules] approved by the project identification team after December 25, 2008.

~~(3) The individual real estate activities that together culminate in a lease or easement are cumulatively referred to as a project.~~

~~(a) The department will not require [NEW RULE VI] through [NEW RULE X] for an individual real estate activity that:~~

~~(i) is consistent with a larger project that has undergone project evaluation and review as described in [NEW RULE VI] through [NEW RULE X]; and~~

~~(ii) has been approved by the project identification team described in [NEW RULE VIII].~~

(3) The department will not require ARM 36.25.906 through 36.25.910 for an individual real estate activity that is associated with a previously approved real estate project.

NEW RULE VI (36.25.906) SITE-SPECIFIC EVALUATION (1) The department will conduct a site-specific evaluation to assess the suitability of a tract or portion of a tract proposed for a real estate project. The site-specific evaluation ~~may~~ will include the following factors:

- (a) unique or sensitive biological and physical features;
- (b) topography;
- (c) influence of floodplains and/or wetlands;
- (d) hazardous geologic conditions;
- (e) known cultural or historic features through a preliminary cultural survey;
- (f) proximity to other public lands or private lands under conservation easement, as documented by information in the Montana Natural Heritage Program database or similar source;
- (g) water availability and water rights;
- (h) existing and required access;
- (i) the location and quality of infrastructure, such as roads, utilities, power, telephone, public water, or sewer availability;
- (j) any existing encumbrances;
- (k) proximity to community infrastructure and utilities; and
- (l) other nearby residential, industrial, or commercial development, proposed or existing; and

(m) wildland fire hazards and available fire protection.

(2) The department will analyze federal, state, and local land-use regulations, plans, and policies, for their relationship to the proposed real estate project. This analysis must identify existing entitlements and any entitlements that must be acquired for the proposed real estate project to achieve the highest return.

(3) The department may conduct a market analysis for a parcel proposed for commercial, industrial, residential, or conservation use. At minimum, the market analysis must identify:

- (a) the size of the current and future ~~residential and commercial~~ market;
- (b) market-growth trends, historic and future; and
- (c) expected rate of return.

~~(4) The department will promote appropriate development on state trust land by generally excluding from consideration:~~

- ~~(a) residential and commercial uses on slopes greater than 25 percent;~~
- ~~(b) residential and commercial projects that would be located in a designated 100-year floodplain or wetland; and~~
- ~~(c) most commercial or residential projects that would adversely affect federally listed threatened and endangered species or critical habitat for threatened and endangered species as designated by the United States Fish and Wildlife Service (USFWS).~~

NEW RULE VII (36.25.907) SITE SELECTION REPORT (1) Field staff will develop a site selection report for each real estate project proposal that will include these elements:

- (a) how the proposed real estate project conforms to the standards in [NEW RULE IV];
  - (b) description of the proposed real estate project, including proposed land use, density, existing and proposed entitlements, required infrastructure improvements, local regulatory approval required, and potential rates of return from the real estate project, if implemented;
  - (c) how the proposed real estate project relates to ARM 36.25.911 and 36.25.912;
  - (d) results of the site-specific evaluation;
  - (e) estimate of the costs and timeline for the proposed real estate project;
- and
- (f) how the proposed real estate project integrates with other trust land management projects or programs.

NEW RULE VIII (36.25.908) PROJECT IDENTIFICATION TEAM AND PROJECT REVIEW COMMITTEE (1) The department will form a project identification team, comprised of, ~~but not limited to~~ bureau staff and field representatives. The project identification team will meet annually, at minimum. The duties of the project identification team will include:

~~(2) The project identification team will meet annually, at minimum. The duties of the project identification team will include:~~

- ~~(a) reviewing and selecting real estate projects proposed by field staff;~~
- ~~(b) reviewing the status of previously selected real estate projects;~~
- ~~(c) canceling previously selected real estate projects; and~~
- ~~(d) assigning resources.~~

~~(3)~~ (2) The project identification team will select real estate projects based upon review of the site selection reports developed by field staff under ARM 36.25.907, in consideration of the following criteria:

- (a) conformance to the standards in ARM 36.25.904;
- (b) relationship to ARM 36.25.911 and 36.25.912;
- (c) results of the site-specific evaluation;
- (d) results of the market analysis, as described in ARM 36.25.906(3);
- (e) staffing and funding needs and limitations;
- (f) project complexity;

(g) project timeline; and  
(h) how the proposed real estate project integrates with other trust land management projects or programs.

~~(4)~~ (3) The department will form a project review committee, comprised of bureau staff and planning and land use staff from each area office. The project review committee will meet annually, at minimum. The duties of the project review committee ~~identification team~~ will generally include:

(a) reviewing the status of previously selected real estate projects;  
(b) assessing resource needs of real estate projects; and  
(c) recommending project proposals to the real estate project identification team.

NEW RULE IX (36.25.909) PROJECT MANAGEMENT LIST ~~(1) The department will provide to the board a list of the projects selected by the project identification team within 30 days, and concurrently send the list to:~~

~~(a) affected lessees and licensees;  
(b) local governments having jurisdiction over the area of a selected project;  
(c) public and private conservation entities; and  
(d) other interested parties.~~

~~(2) The department will post the list on the department's web site.~~

(1) The department will create a project management list of the real estate projects selected by the project identification team. The list will identify new real estate projects, existing or previously approved real estate projects, and canceled real estate projects.

(2) The department will create and maintain a list of persons, conservation entities, and other organizations interested in receiving notice of new real estate projects.

(3) Within 30 days of the project identification team's selection of new real estate projects, the department will:

(a) provide the project management list to the board;  
(b) provide a list of new real estate projects to interested persons who have made a request to the department to be informed of new real estate projects; and  
(c) post the project management list on the department's web site.

(4) The department will notify affected lessees and licensees and local governments having jurisdiction over the area of a selected real estate project.

NEW RULE X (36.25.910) NOTIFICATION OF CONSERVATION INTEREST

~~(1) After posting a project management list on the department's web site providing notice of new real estate projects pursuant to ARM 36.25.909, the department shall allow conservation entities 60 days in which to propose a conservation use of those lands by issuing a letter of intent to the department. By such a letter of intent, an entity may seek to secure for conservation uses any tract or portion of a tract proposed by the project identification team for a residential, industrial, or commercial use.~~

(2) A conservation entity submitting a letter of conservation intent during the 60 days has an additional 45 days in which to apply to the department for a lease, license, easement, or other approved legal instrument to secure conservation use,

as approved by the department. The 45 days begin on the day following the last day of the 60-day period. An entity applying within the 45-day period has 12 months to secure a conservation use. The department may extend the 12 month period.

(a) Issuance of a conservation lease, license or easement shall be made pursuant to Article X, section 11 of the Montana Constitution. The department reserves the right to approve or deny a proposal for a conservation use.

~~(a)~~ (b) The department may require bonding, letter of credit, or nonrefundable deposit as part of the application for a conservation use.

(3) Any real estate project on the project management list may proceed forward if:

(a) the department receives no letter of intent within the 60-day period;

(b) a conservation entity submits a letter of intent within the 60 days but fails to apply to the department within the subsequent 45 days; or

(c) a conservation entity submits a letter of intent and application within the applicable periods but fails to secure conservation use on the subject property within 12 months, unless the department has granted an extension.

NEW RULE XI (36.25.911) NEW DEVELOPMENT THRESHOLDS ~~(1) If the aggregate acreage of real estate activities described in (2) exceeds, or is anticipated to exceed during the term of the plan, 30,000 acres, the department will conduct a programmatic review of the plan before any additional projects may be developed.~~

~~(a) The department will also conduct a programmatic review of the plan before any additional projects may be developed, if the aggregate acreage in rural areas exceeds, or is anticipated to exceed during the term of the plan, five percent of the 30,000-acre statewide threshold.~~

~~(2) The following, as a result of new projects developed after July 18, 2005, will count toward the thresholds in (1) and (2):~~

(1) The statewide threshold is 30,000 acres. The department will conduct a review of the plan as specified in ARM 36.25.914(2) if the aggregate acreage of real estate projects, sales and exchanges meeting the criteria described in ARM 36.25.916(2) exceeds the statewide threshold, or is anticipated to exceed the statewide threshold during the term of the programmatic plan.

(a) Five percent of the statewide threshold, termed the rural threshold, is allocated for rural real estate projects, sales, and exchanges. The rural threshold is 1500 acres. The department will conduct a review of the programmatic plan as specified in ARM 36.25.914(2) if the aggregate acreage of real estate projects, sales and exchanges in rural areas meeting the criteria described in ARM 36.25.916(2) exceeds the rural threshold or is anticipated to exceed the rural threshold during the term of the programmatic plan.

(2) The following, unless otherwise exempted in ARM 36.25.912, will count toward the applicable thresholds in ARM 36.25.911(1) and (1)(a):

(a) tracts leased or under easement for commercial and industrial uses;

(b) tracts leased or under easement for residential uses at a density greater than one residential unit per 25 acres;

(c) tracts disposed of through sale or exchange, and subdivided or developed within five years following sale for a commercial or industrial use ~~within five years following sale~~; and

(d) ~~tracts disposed of through sale or exchange; and subdivided or developed within five years following sale for residential use where the planned at a density is greater than one residential unit per 25 acres within five years following sale.~~

NEW RULE XII (36.25.912) NEW DEVELOPMENT THRESHOLD EXEMPTIONS (1) ~~The following will be exempt from the thresholds in [NEW RULE XI(1)]:~~

(1) An urban tract meeting any one of the following criteria will be exempt from the statewide threshold in ARM 36.25.911(1). A rural tract meeting any one of the following criteria will be exempt from the rural threshold in ARM 36.25.911(1)(a) and the statewide threshold in ARM 36.25.911(1):

(a) leases, sales, exchanges, and easements to a public entity, for a public facility, community service, public benefit, or for a private sewer or water system;

(b) acres under lease or easement for communications facilities, or for wind, geothermal, or solar power generation;

(c) acres under easement for public or private rights-of-way;

(d) acres secured for conservation use;

(d) a tract developed for commercial, residential, or industrial uses through lease or easement or following sale or exchange, whereby such uses are clustered on not more than 25 percent of a tract and the remainder of the tract is designated for conservation in perpetuity through an easement, deed restriction, or dedication upon final subdivision approval;

(e) tracts disposed of through sale or exchange with restrictions limiting residential density to one residential unit per 25 acres, or limiting development to not more than 25 percent of the tract and designating the remainder as open space;

(e) a tract developed for residential lease or easement, or disposed of through sale or exchange, with restrictions limiting residential density to one residential unit per 25 acres;

(f) a tract sold or exchanged and not developed until after five years following the sale closing date;

(f) (g) an isolated tracts sold or exchanged except in Beaverhead, Broadwater, Carbon, Cascade, Flathead, Gallatin, Lewis and Clark, Lake, Madison, Missoula, Park, Powell, Ravalli, Stillwater, Sweet Grass, Teton, and Yellowstone counties;

(g) (h) acres dedicated for conservation upon final as open space during subdivision approval review in excess of minimum state and or local subdivision requirements;

(h) tracts subdivided for residential lease or easement, limiting density to one residential unit per 25 acres, or limiting development to 25 percent of the tract and designating the remainder as open space;

(i) a tracts within a receiving area established by a local jurisdiction as part of a transfer of development rights program, and subdivided developed for commercial, industrial, or residential use using by means of development rights permanently transferred from land in the sending area; and

(j) a tracts subdivided developed for residential development use at a density greater than one unit per 25 acres when the potential density of one or more

additional tracts is reduced in perpetuity by an equal or greater amount, such that the combined development density of all tracts is not greater than one unit per 25 acres. using development rights transferred, at a rate of one development right per 25 acres of lands protected, from another tract of state trust land. This exemption applies to lands subdivided for lease, easement, exchange, or sale, and includes lands subdivided receiving final subdivision approval within five years following sale.

(2) A rural tract that is not otherwise exempt from the rural and statewide threshold as provided in ARM 36.25.912(1), will be exempt from the rural threshold but will still count toward the statewide threshold when one of the following criteria are met:

- (a) the tract is developed consistent with zoning adopted by the county's governing body in compliance with Title 76, chapter 2, part 1 or part 2, MCA; or
- (b) the developed use meets all of the following:
  - (i) provides infill opportunities;
  - (ii) is contiguous to existing development;
  - (iii) is or can be located within a sewer or water utility service area;
  - (iv) adds value to existing uses;
  - (v) demonstrates economic viability; and
  - (vi) conforms to the development standards in ARM 36.25.904.

NEW RULE XIII (36.25.913) ACCOUNTING AND REPORTING (1) The department will account for real estate management activities that meet ARM 36.25.910 and 36.25.912]. In addition, the department will account for the following:

- (a) acres under commercial, industrial, or residential lease where no commercial, industrial, or residential lease existed previously;
- (b) acres under easement for commercial, industrial, or residential use;
- (c) nonisolated tracts sold and subdivided developed for a commercial, industrial, or residential ~~residential or commercial~~ use within five years of sale;
- (d) tracts acquired with existing commercial, industrial, or residential development;
- (e) tracts, or portions of tracts, encumbered or purchased with an existing conservation lease, license, easement, or other means of securing conservation uses;
- (f) nonisolated tracts sold and encumbered with a restriction on development for conservation uses within five years of sale;
- (g) acres dedicated as open space during subdivision review in excess of minimum requirement; and
- (h) acres designated as "Natural Area" per Title 77, chapter 12, part 1, MCA.

(2) The department may account for other land use, development, and disposition in other department documentation, such as annual reports.

(3) The department will report the results of the accounting to the board by August 2010 and every five years thereafter.

NEW RULE XIV (36.25.914) MANAGEMENT OF THE REAL ESTATE  
MANAGEMENT PLAN (1) In July 2010 and every five years thereafter, the Real Estate Management Bureau bureau will issue a report upon the implementation and

effectiveness of the plan, including a recommendation on the need for significant changes to the plan.

(2) Upon review of such reports, the board or the department may consider a ~~programmatic~~ review of the programmatic plan for any of the following reasons:

- (a) the thresholds in [NEW RULE XI(1)] or (1)(a) have been exceeded;
- (b) new legislation is adopted that is incompatible with the selected alternative;
- (c) the board provides new direction; or
- (d) the Trust Land Management Division administrator judges that the original assumptions supporting the plan no longer apply.

(3) The department may implement and initiate real estate projects during a ~~programmatic~~ review of the programmatic plan pursuant to ARM 36.2.537.

(4) The department may make minor changes or additions to the plan without a ~~programmatic~~ review of the entire programmatic plan, as long as those changes are compatible with the overall plan, as determined by the department.

(a) Cumulative minor changes may result in the department's ~~programmatic~~ review of the programmatic plan.

NEW RULE XV (36.25.915) MINIMUM LEASE CALCULATION (1) Pursuant to 77-1-905(2), MCA, the department will set the minimum annual rent for any commercial lease to obtain the full market value of that lease. Such rental shall be at a rate not less than the product of the appraised value of the land multiplied by a rate that is 2 percentage points a year less than the current federally-guaranteed, annual, 20-year bond rate provided by the Montana Board of Investments commercial loan rate sheet. For the purpose of calculating the minimum annual rent, the department may round the 20-year rate to the nearest whole number.

NEW RULE XVI (36.25.916) SURVEYING AND PLATTING OF LANDS

~~PRIOR TO SALE~~ DELEGATION OF AUTHORITY TO DEPARTMENT FOR

SURVEYING, PLATTING, AND EXACTIONS

(1) The board delegates to the department, subject to its review, its authority under 77-1-301, 77-2-309, and 77-2-310, MCA, to determine whether it is in the best interest of the trust beneficiaries to survey, plat, or create blocks and lots of state lands prior to sale.

~~(a) State trust lands may be sold under the Land Banking Program without added entitlements where:~~

- ~~(i) it is in the best interest of the trust beneficiaries;~~
- ~~(ii) additional entitlements are not in the interests of a local jurisdiction; or~~
- ~~(iii) staff and budget constraints make it impractical to seek entitlements.~~

(2) The board delegates to the department, consistent with the board's fiduciary duties and subject to the board's review, its authority to agree to exactions, conditions, restrictions, or fees imposed as a result of zoning, annexation, subdivision, or building permit approval processes within Title 7, 50, 67, or 76, MCA, or local land use regulations.

NEW RULE XVII (36.25.917) APPRAISAL OF LAND PRIOR TO LEASE OR

EASEMENT (1) ~~Prior to offering a lease for competitive bid or an easement for sale, the department shall appraise the parcel under consideration for lease or~~



issuance of an easement. The department may conduct the appraisal or the department may contract with a Montana-licensed certified general appraiser. The department shall review and approve an appraisal conducted by a contract appraiser.

(2) The appraisal must:

(a) include state-owned improvements in the valuation; and

(b) use comparable sales for like properties.

(3) Appraisals must be updated or parcels reappraised:

(a) where issuing a lease, if the appraisal is older than two years; and

(b) where issuing an easement, if the appraisal is older than one year.

(4) Appraisals may be updated or reappraised earlier than as required in (3)(a) and (b).

(5) Appraisals for sales, exchanges, and land banking are governed by ARM 36.25.805.

(1) The value of a parcel under consideration for lease or issuance of an easement shall be determined through an appraisal or limited valuation.

(2) An appraisal must include state-owned improvements in the valuation and use comparable sales for like-properties. The department may conduct an appraisal or appraisal update; or the department may contract with a Montana-licensed certified general appraiser. The department shall review and approve an appraisal or appraisal update conducted by a contract appraiser.

(3) A limited valuation is an estimation of value through other means which may include:

(a) the department's fee schedule;

(b) a survey of real estate appraisers, local tax assessors or local realtors; or

(c) an evaluation of local rents or local market fees.

(4) An appraisal or limited valuation must be updated, or the parcel reappraised:

(a) where issuing a lease, if the appraisal or limited valuation is older than two years; and

(b) where issuing an easement, if the appraisal or limited valuation is older than one year. An appraisal or limited valuation may be updated or the parcel reappraised earlier than as required in (a) and (b).

NEW RULE XVIII (36.25.918) CATEGORICAL EXCLUSIONS (1) Real estate management activities that are classified as categorical exclusions shall not require an environmental assessment or environmental impact statement.

(a) Categorical exclusions include activities on state trust lands conducted by others under the authority of the department as well as activities conducted by the department itself.

(2) Categorical exclusions shall not apply in extraordinary circumstances where the Real Estate Management Bureau is proposing an activity:

(a) upon sites with high erosion risk;

(b) where federally listed threatened and endangered species or critical habitat for threatened and endangered species, as designated by the USFWS, may be affected;

(c) where Native American religious and cultural sites may be affected;

- ~~(d) where archaeological sites may be affected;~~
- ~~(e) where historic properties and areas may be affected;~~
- ~~(f) where several related, categorically-excluded individual activities may cumulatively result in significant impacts to the human environment because they will either occur close in time or in the same geographic area. Such related actions may be subject to environmental review even if they are not individually subject to review; or~~
- ~~(g) where the activity would result in a violation of any applicable state or federal laws or regulations.~~

~~(3)~~ (1) Pursuant to 77-1-121, MCA, and ARM 36.2.523(5), the board adopts the following additional categorical exclusions for real estate management activities conducted upon state trust lands:

- (a) lease and license administration including review, inspection, amendments, assignments, renewals, and enforcement of terms and conditions;
- (b) department review and approval of lease or license modifications, improvements, removal of improvements, and new utility service connections, consistent with applicable regulations;
- (c) adjustments to the boundaries of existing leases or licenses, consistent with applicable regulations;
- (d) project planning and design;
- (e) project evaluation under ARM 36.25.906;
- (f) development of a site selection report under ARM 36.25.907;
- (g) project selection under ARM 36.25.908;
- (h) development of the project management list under ARM 36.25.909;
- (i) marketing of state trust lands proposed for lease, license, or easement;
- (j) short-term land use licenses, involving no resource extraction or developed uses, and conforming to local permitting and land use regulations; and
- (k) other real estate management activities administered by the bureau on state trust lands that are not in connection to:
  - (i) a department proposal for a sale, exchange, easement, placement of improvement, lease, license, or permit; or
  - (ii) a department review of an application for authorization of a sale, exchange, easement, placement of improvement, lease, license, or permit; ;
  - (l) department request to amend a local growth policy or zoning regulation;
  - (m) department request to amend or develop a neighborhood plan or extension of services plan;
  - (n) annexation; and
  - (o) land acquisition. Categorical exclusions include activities on state trust lands conducted by others under the authority of the department as well as activities conducted by the department itself.
- (2) Categorical exclusions shall not apply in extraordinary circumstances where the bureau is proposing an activity:
  - (a) upon sites with high erosion risk;
  - (b) where critical habitat for federally listed threatened and endangered species may be affected;
  - (b) where Native American religious and cultural sites may be affected;
  - (c) where archaeological sites may be affected;

(d) where historic properties and areas may be affected;

(e) where several related categorically-excluded individual activities may cumulatively result in significant impacts to the human environment because they will either occur closely in time, or in the same geographic area. Such related actions may be subject to environmental review even if they are not individually subject to review; or

(f) where the activity would result in a violation of any applicable local, state, or federal laws or regulations.

4. The following comments and testimony were received and appear with the department's responses:

COMMENT 1

The phrase "programmatic review of the plan" is found throughout the rules. It should be replaced with "review of the programmatic plan."

RESPONSE 1

The department concurs and has made the change.

COMMENT 2

The term "real estate project" should replace the term "project" to make clear that the rules apply to real estate development and not other activities on state trust lands, such as agriculture or oil and gas leasing.

RESPONSE 2

The department concurs and has made the change.

COMMENT 3

Once rules are implemented, develop more user-friendly tools to help provide better explanation of the process.

RESPONSE 3

Following adoption of the rules, the department will develop an implementation guide for these rules. The guide will be made available to the public.

COMMENT 4

Commenter asked the department to clarify where public comment is allowed and/or invited for a proposed real estate management project.

RESPONSE 4

Opportunity for the public to provide comment on a proposed real estate project will occur through one or more of the following: 1) public scoping is an integral component of Montana Environmental Policy Act (MEPA) compliance, and all real estate project proposals on state trust land require compliance with MEPA; 2) public hearings before the Montana Board of Land Commissioners when the board considers a sale or exchange of state trust land, issuance of an easement, and issuance of a lease providing annual income in excess of \$50,000; 3) through

meetings with neighborhood councils, public hearings before city or county commissions, planning/zoning boards, or other public bodies having authority over a particular aspect of a real estate project; and 4) per 77.2.306, MCA, the department may not sell a tract of state land in excess 160 acres without first consulting the board of county commissioners of the county or counties in which the lands to be sold are located.

COMMENT 5

Clarify how these rules interact with the land banking program. Commenter believes that these rules should apply to all land banking activities.

RESPONSE 5

The department concurs and has made revisions throughout to clarify how these rules apply to sales and exchanges of state trust land.

COMMENT 6

Consider including an assessment of conservation values as part of the department's site evaluation process.

RESPONSE 6

An assessment of conservation values is an essential component of the site-specific evaluation process defined under ARM 36.25.906(1)(a) through (f). The presence of conservation values on a specific tract will be considered in determining the tract's suitability for development.

COMMENT 7

Develop a rule that would prohibit development in flood-prone areas.

RESPONSE 7

ARM 36.25.904(3)(i)(ii) states that the department will avoid adverse impacts in a floodplain.

COMMENT 8

Include a provision that the agency will notify conservation groups and others, upon request, when projects are approved.

RESPONSE 8

The department concurs and has amended ARM 36.25.909 accordingly. The department will maintain a contact list, and will notify the parties on the contact list when new projects are selected.

COMMENT 9

The review process and notification appear effective. It is unclear how the DNRC will have access to local government input to evaluate the impacts and merits of a proposed sale or lease of property before the property has been transferred to the developer, such as a proposed subdivision. It appears the DNRC, as the property owner, would need to apply jointly with the developer to allow the local review

process to determine the impact and suitability of the real estate project. The order in which the government entities, local or state, would give approval is unclear.

RESPONSE 9

See Response 4. The department will comply with the application procedures and subdivision review process prescribed by a local government entity. When the order or timing of local and state approvals is in conflict or incompatible, the department will use its discretion to determine the best course of action.

COMMENT 10

Giving preference to tracts "most suitable for development," "urban over rural," and "consistent with local land use regulations" will support local smart growth planning efforts.

RESPONSE 10

The department concurs.

New Rule I (36.25.901) DEFINITIONS

COMMENT 11

Clarify in ARM 36.25.901(5) what kinds of commercial and residential uses may be allowed in conjunction with conservation uses by defining what the department means by "limited commercial and residential uses."

RESPONSE 11

The department has amended the definition of conservation to eliminate the reference to commercial or residential uses.

COMMENT 12

Consider including a definition of "development rights" in order to clarify that the department can sell development rights for conservation purposes.

RESPONSE 12

The department has amended ARM 36.25.910(1)(a) to clarify that Article X, section 11, of the Montana Constitution provides for the disposal of an estate or interest in state trust land. The amendment further clarifies that department will reserve the right to approve or deny a proposal for a conservation on state trust lands.

COMMENT 13

Industrial uses should be separated from commercial uses in the definitions and throughout the rules.

RESPONSE 13

The department concurs and has made the change.

COMMENT 14

Add to ARM 36.25.901(17) a definition of "limited property interest" and add specific terms in this subsection in order to clarify for the public how licenses will be applied and why they are exempt from these rules under ARM 36.25.903(3).

#### RESPONSE 14

Land use licenses are temporary and non-consumptive in nature. Licenses are issued according to ARM 36.25.101, et seq., and the department's land use license policy. Per ARM 36.25.106(2), land use licenses are limited to ten years.

#### COMMENT 15

Commenter asked if "cluster development" referred to "cluster development" as defined by adopted subdivision regulations in accordance with 76-3-509, MCA, or any development that concentrates building lots on a portion of the tract and conserves the remainder?

#### RESPONSE 15

The term "cluster development," as it is used in these rules, is defined in ARM 36.25.901.

#### COMMENT 16

Commenter asked for clarification of the distinction between "residential" and "commercial". A condominium may be a "multi-family residential" with ownership being the only difference.

#### RESPONSE 16

The department has amended the definition of residential to eliminate the reference to condominium.

#### COMMENT 17

There are many activities associated with development and developed parcels that are left out of the definition of "developed" in ARM 36.25.901(8). Specifically, the construction of roads is a clear development activity that is overlooked under this proposed definition.

#### RESPONSE 17

The term "developed" has specific meaning and function in these rules and is not necessarily meant to capture the full scope of what would constitute development on the ground.

#### COMMENT 18

State lands currently qualifying as "urban" are realistically more suitable for rural (if any) development. Commenter encouraged the DNRC to adopt an approach similar to that as outlined in 76-3-601(2)(b), MCA, to define which state trust lands are "urban."

#### RESPONSE 18

The term "urban" has specific meaning and function in these rules and is consistent with the ROD. The classification of a specific tract of state trust land is not an indicator of its suitability for commercial, industrial or residential development. Before a tract is developed, it must be found suitable as determined by the department's project evaluation, review, and selection process.

#### New Rule III (36.25.903) GENERAL APPLICABILITY

##### COMMENT 19

Commenter asked that in order to make it clear when the subsection (2)(b) applies, to add language stating that that this subsection only applies to projects that have received all local government approvals prior to December 15, 2008.

##### RESPONSE 19

The department concurs and has made the change.

##### COMMENT 20

The courts would decide this matter (ARM 36.25.903), not department staff. ARM 36.25.903(4) should be clarified to reflect that this decision will be made by courts and not staff.

##### RESPONSE 20

The department has deleted ARM 36.25.903(4).

#### New Rule IV (36.25.904) GENERAL DEVELOPMENT STANDARDS

##### COMMENT 21

Commenter stated that 36.25.904(3) is confusing because it states this is a list of project standards. Yet, they can be applied "whenever appropriate and feasible." That makes the list more like a set of guidelines instead of required standards.

##### RESPONSE 21

The department concurs and has deleted the language "whenever appropriate and feasible" from ARM 36.25.904(3). The department has also made several revisions to clarify the department's intent in complying with the development standards as well as local regulations.

##### COMMENT 22

Clarify what can happen on "urban lands" and what the definition for "urban densities."

##### RESPONSE 22

The department has amended ARM 36.25.904(3)(c). Lands meeting the definition of "urban" may be developed for all uses consistent with local land use regulations. In addition, ARM 36.25.904 and 36.25.906 provide additional criteria which may impose further restrictions beyond those provided in local land use regulations to determine the specific location, type and scale of development.

COMMENT 23

ARM 36.25.904(3) states that DNRC will comply with local land use regulations. Commenter asked the department to consider following growth policy designations for those areas without zoning.

RESPONSE 23

The project evaluation and review process (ARM 36.25.905 through 36.25.910) provides for review and consideration of an adopted growth policy. Given that growth policies in themselves are not enforceable without land use regulations such as zoning, the department will use its discretion when approving real estate projects that are inconsistent with growth policy.

COMMENT 24

The rural development standards set forth on pages 6 and 8 of the ROD should be added to the rules.

RESPONSE 24

The department concurs and has made the change.

COMMENT 25

The rules should state what types of improvements will be allowed in a floodplain.

RESPONSE 25

The department concurs. ARM 36.25.904(4) has been amended to clarify the department's intent to limit improvements in the floodplain to those with no adverse impacts.

COMMENT 26

Commenter asked that the following language be added at the beginning of ARM 36.25.904(3): "Subject to constitutionally and statutorily mandated financial fiduciary requirements applicable to trust lands."

RESPONSE 26

Because the application of administrative rules is always subject to constitutional limitations, the department believes inserting such language is unnecessary.

COMMENT 27

The term "generally exclude" in 36.25.906(4) implies that the department will sometimes consider projects on steep slopes, floodplains, etc. Commenter asked which criteria will be used to determine when projects are appropriate in these areas?

RESPONSE 27

The department concurs with this statement. The department has amended the subsection to clarify that real estate projects will not be considered in these areas unless the department employs necessary measures to avoid, minimize, or mitigate



impacts potentially resulting from a commercial, industrial, or residential use. The department has also moved ARM 36.25.906(4) to 36.25.904(3)(i) where the development standards are more appropriate.

COMMENT 28

Given the department's focus on fire hazard issues in the state and the tremendous cost of firefighting, DNRC may want to consider adding high fire hazard areas to the factors listed in ARM 36.25.906(1).

RESPONSE 28

The department concurs and has incorporated this recommendation.

COMMENT 29

Development with adverse impacts should not be allowed in a floodplain on state trust lands.

RESPONSE 29

The department agrees and has amended ARM 36.25.904(3)(i) to require the department to avoid adverse impacts in the floodplain. Adverse impacts will be determined by the department through an environmental review in compliance with Title 75, chapter 1, MCA.

COMMENT 30

Commenter asked that the department consider adding a subsection which would read: "...amount of state threshold land available", in ARM 36.25.904(2).

RESPONSE 30

The department concurs and has made the change.

COMMENT 31

Commenter asked the department to consider adding the underlined: "...the following standards, when applicable, in selecting, prioritizing, designing and implementing...", to ARM 36.25.904(3).

RESPONSE 31

The department concurs and has made the change.

COMMENT 32

Commenter recommend adding the following language at the end of the sentence in ARM 36.25.904(3)(i)(iii): "...including but not limited to grizzly bear recovery areas and critical habitat for bull trout."

RESPONSE 32

The department disagrees. ARM 36.25.904(3)(i)(iii), as written, is consistent with the ROD.

New Rule VI (36.25.906) SITE-SPECIFIC EVALUATION

COMMENT 33

Remove the phrase "when applicable" before the list of factors. All of the factors should be included in the evaluation, even if the result is that a factor does not apply.

RESPONSE 33

The department concurs and has made the change.

COMMENT 34

Commenter stated that in ARM 36.25.906(1)(i), the quality of infrastructure, not just its location, should be a consideration when evaluating the suitability of a tract for development.

RESPONSE 34

The department concurs and has made the change.

New Rule X (36.25.910) NOTIFICATION OF CONSERVATION INTEREST

COMMENT 35

Commenter stated that it appears conservation interests have the option to intercede and stop a proposed exchange or sale of land or development proposal involving residential, commercial, or industrial uses. It is not clear how the DNRC would weigh the benefits of preserving open space through conservation, versus increasing revenue on trust lands through development, especially in response to the goal of "prioritizing real estate projects with the highest financial rate of return."

RESPONSE 35

A conservation entity does not have the ability to intercede in the actions of the department. The department believes the process described in ARM 36.25.910 is appropriate. Should a conservation entity propose a conservation use, the department will consider the merits of the conservation proposal, including the potential financial return that could result, before making a final determination. The department reserves the right to approve or deny a proposal for a conservation use.

New Rule XI (36.25.911) NEW DEVELOPMENT THRESHOLDS

COMMENT 36

Commenter asked why the 25 percent coverage exemption is limited to only residential development? Commenter stated that it should apply to commercial development as well.

RESPONSE 36

The department has amended ARM 36.25.911 to include commercial and industrial uses in the 25 percent exemption as well.

COMMENT 37

Commenter stated that the most important decision made in the ROD is the five percent cap on development of state lands in rural areas. It would be inappropriate to delete this provision.

RESPONSE 37

The five percent rural threshold is provided in ARM 36.25.911(1)(a).

COMMENT 38

Commenter asked to amend ARM 36.25.911(1)(a) to state that "the department will also undertake a programmatic review of the plan before any additional projects may be developed, if the aggregate acreage in rural areas exceeds, or is anticipated to exceed during the term of the plan, 1500 acres."

RESPONSE 38

The department concurs and has incorporated the recommendation along with several other modifications to the text in ARM 36.25.911(1) in order to make clear the intent of the department in regard to the development thresholds.

New Rule XII (36.25.912) NEW DEVELOPMENT THRESHOLD EXEMPTIONS

COMMENT 39

Commenter asked to add a provision that would exempt a development from the rural development and location standards (under ARM 36.25.904), if the development complies with the provisions that limit development to 25 percent of the tract, and designating the remainder as open space.

RESPONSE 39

The department concurs and has amended the rural development standards in ARM 36.25.906(6) to provide for consideration of other uses when development is limited to 25 percent of a tract and the remainder is designated for conservation through an easement, deed restriction, or dedication at final subdivision approval.

COMMENT 40

Commenter asked to remove ARM 36.25.912(1)(f) since isolated tracts could still be developed if they are sold; and therefore, they should count towards the thresholds.

RESPONSE 40

The department concurs in part. The department has amended the exemption for lands sold or exchanged in the high growth counties of the state, where development during the five years following sale is more likely. Isolated tracts sold or exchanged, in all other counties will remain exempt from the thresholds.

COMMENT 41

The exemption for designation of open space under several of the subsections should only apply when the public benefits from open space being protected in perpetuity. Commenter asked that the phrase "in perpetuity" to these subsections.

RESPONSE 41

The department concurs and has made the change.

COMMENT 42

Commenter asked that the exemption for a locally-adopted transfer-of-development-rights (TDR) program be removed in ARM 36.25.912(1)(i) because it does not set forth any standard that the department will use to determine if a TDR can be used for a project to receive an exemption from the threshold. Commenter says that DNRC should only allow a TDR to be used as an exemption if it follows the standard of one development right per 25 acres protected.

RESPONSE 42

The department disagrees. An exemption for locally-adopted TDR programs is appropriate, and recognizes the extensive planning analysis and public participation made by local jurisdiction in developing a TDR program. It would not be appropriate to further restrict density on state trust lands in a TDR receiving area (which is where the jurisdiction has determined higher density to be appropriate) to anything less than the density determined by the local jurisdiction. The department desires to assist a local jurisdiction to meet the goals of its TDR program by utilizing all the mechanisms the TDR program provided.

COMMENT 43

Rural projects subject to zoning should be exempt from the thresholds.

RESPONSE 43

The department agrees and has incorporated this concept. Two exemptions from the rural threshold have been added. Rural projects, sales, and exchanges that are developed in consistent with county zoning will be exempt from the rural threshold. Also, an exemption from the rural threshold is provided for projects, sales, and exchanges that meet all of the standards of ARM 36.25.912(2)(b). A rural project, sale, or exchange meeting one of these two exemptions will also be exempt from the statewide threshold if it meets an exemption under 36.25.912(1).

COMMENT 44

Commenter urged the department to remove the term "public benefit" because it is too vague to use in an exemption from the thresholds ARM 36.25.911(1)(a).

RESPONSE 44

The department concurs and has made the change.

COMMENT 45

ARM 36.25.912(1) makes provisions for a number of exemptions from the development thresholds. Depending on the number of roads or other types of infrastructure that may require easements/rights-of-way, this exemption could conceivably increase the number of overall developable acres.

RESPONSE 45

A large majority of the road or right-of-way easements issued by the department upon, or across state trust land, are for existing or proposed development on adjacent land under other ownership. When a commercial, industrial, or residential real estate project is developed on a tract of state trust land, the project will be counted toward the thresholds in ARM 36.25.911.

COMMENT 46

As proposed, a rural tract meeting both ARM 36.25.912(2)(a) or (b) and an exemption under ARM 36.25.912(1) would be exempt from meeting the statewide rural threshold. However, ARM 36.25.912(1) indicates that certain development activities would be exempt from the rural threshold if they meet one of the ten criteria; however, the rule does not mention that criteria ARM 35.25.912(2)(a) or (b) must also be met. Commenter recommended that the text "and (1)(a)" be removed from ARM 36.25.912(1).

RESPONSE 46

The department has amended ARM 36.25.911 and 36.25.912 to clarify the application of the statewide and rural thresholds.

New Rule XIV (36.25.914) MANAGEMENT OF THE REAL ESTATE  
MANAGEMENT PLAN

COMMENT 47

Commenter stated ARM 36.25.914(3) seems to conflict with the language under ARM 36.25.911. Commenter would like to see the language added "except as provided for under 36.25.911."

RESPONSE 47

The department concurs and has made several revisions to clarify this rule and department intent when conducting a review of the programmatic plan.

New Rule XVI (36.25.916) DELEGATION OF AUTHORITY TO DEPARTMENT  
FOR SURVEYING, PLATTING AND EXACTIONS

COMMENT 48

The board should delegate to the department the authority to approve fees, dedications, and other exactions on state trust lands that result from zoning, annexation, subdivision, or building permit approval.

RESPONSE 48

The department agrees and has amended ARM 36.25.916 to incorporate this recommendation.

New Rule XVIII (36.25.918) CATEGORICAL EXCLUSIONS

COMMENT 49

The categorical exclusions should apply to all administrative activities, including management of existing leases and licenses.

RESPONSE 49

The department has amended ARM 36.25.918 to clarify the application of categorical exclusions. The administration and management of existing leases and licenses are administrative activities consistent with the categorical exclusions provided in ARM 36.2.523(5)(b) through (f). New real estate projects, sales, and exchanges could conceivably affect threatened and endangered species and critical habitat. These actions are not categorically excluded and require environmental review.

COMMENT 50

Commenter asked about categorical exclusions for department actions toward amendment of a growth policy or zoning regulation, amendment or development of a neighborhood plan, or extension of services plan, annexation, and land acquisition.

RESPONSE 50

The department agrees and has amended ARM 36.25.918 to incorporate this recommendation.

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

/s/ Mary Sexton

MARY SEXTON

Director

Natural Resources and Conservation

/s/ Tommy H. Butler

TOMMY H. BUTLER

Rule Reviewer

Certified to the Secretary of State on December 15, 2008.